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EPA Docket Center
WJC West Building, Room 3334
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Washington, D.C. 20004

Mr. Scott Pruitt
EPA Administrator
United States Environmental Protection Agency
EPA Headquarters
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RE: Comments on State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 82 FED. REG. 61507 (DEC. 28, 2017) Docket ID No. EPA–HQ–OAR–2017–0545.

Dear Administrator Pruitt:

On behalf of Morning Star Packing Company, Merit Oil Company, The Loggers Association of Northern California, and Norman R. "Skip" Brown (the "California Commenters"), Texas Public Policy Foundation ("TPPF") hereby submits comments on the Environmental Protection Agency's ("EPA's" or the "Agency's") Advanced Notice of Proposed Rulemaking ("ANPR") regarding possible replacement of EPA's rule promulgated in 2015 known as the Clean Power Plan, 80 Fed. Reg. 64,661 (Oct. 23, 2015), which regulates carbon dioxide emissions from existing power plants under Section 111(d) of the Clean Air Act (the "Clean Air Act" or the "Act"). *See* 42 U.S.C. § 7411(d).

EPA previously proposed repealing the Clean Power Plan in connection with President Trump's Executive Order 13783, which directed the Agency to determine whether the Clean Power Plan exceeds the authority delegated to EPA by Congress in the Clean Air Act. *See* 82 Fed. Reg. 16,093 (March 31, 2017). The proposed repeal, 82 Fed. Reg. 48,035 (Oct. 16, 2017), asked for public comment, and the California Commenters duly filed comments in support of EPA's proposal to repeal the Clean Power Plan.

In its ANPR EPA sought comments on a possible replacement rule to the Clean Power Plan, if it is repealed. *See* 82 Fed. Reg. 61507 (Dec. 28, 2017). The Notice stated that EPA

> is considering proposing emission guidelines to limit greenhouse gas (GHG) emissions from existing electric utility generating units (EGUs) and is soliciting information on the proper respective roles of the state and federal governments in that process, as well as information on systems of emission reduction that are applicable at or to an existing EGU, information on compliance measures, and information on state planning requirements under the Clean Air Act (CAA).

Id. at 61508. The instant comments are made by the California Commenters to inform EPA of the significant obstacles under Section 111 and other sections of the Clean Air Act to replacing the Clean Power Plan with revised standards aimed at regulating carbon dioxide emissions from existing electric generating units.

Executive Summary

The California Commenters support EPA's proposal to repeal the Clean Power Plan (sometimes referred to herein as the "Plan"); however, many of the same problems that plagued the Plan will arise with attempts to replace it.

The California Commenters support the Agency's position that Section 111 of the Clean Air Act is limited solely to emission reduction measures that can be applied to or at an individual stationary source. "That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator can implement on behalf of the source at another location." 82 Fed. Reg. 48,035, 48,039 (Oct. 16, 2017). Section 111(d) of the Act authorizes EPA to regulate emissions through *performance standards*. EPA's Clean Power Plan dictates the manner by which states determine the mix of resources that will be utilized by power plants to generate in-state power. As such, the Plan is unlawful and any replacement plan must avoid exceeding the statutory limits placed on EPA by Congress in Section 111(d).

There are significant obstacles to EPA fashioning a lawful replacement for the Clean Power Plan while focusing on carbon dioxide emissions from electric generating units. For example, the Clean Air Act does not permit EPA to regulate emissions from stationary sources under Section 111 when emissions from such sources are also regulated under Section 112. EPA has regulated coal-and-oil-fired electric generation unit emissions under Section 112 since December 20, 2000.

On February 16, 2012, EPA began regulating *all* fossil fuel-fired electric generation unit emissions under Section 112. Accordingly, emissions from such electric generation units may not be regulated now under Section 111.

Even without that statutory roadblock, there are several steps EPA would be required to take before implementing a lawful replacement rule.

First, EPA has failed to make an endangerment finding for carbon dioxide under the proper legal standard, which is a prerequisite to regulating emissions from any stationary source category under Section 111. In fashioning the Clean Power Plan, EPA asserted that the endangerment finding it made in 2009 in connection with mobile source emissions under Section 202 is sufficient because it provides a "rational basis" for the Clean Power Plan. But the endangerment finding made by EPA under Section 202 is *not* a finding that *carbon dioxide* of itself emitted by *any* stationary source endangers public health and welfare. Rather, it is a finding that a *suite* of six greenhouse gases (carbon dioxide combined with five others) emitted from *mobile* sources endangers public health and welfare. Due to the substantial differences in the nature of emissions from stationary and mobile sources, Congress created different statutory regimes in which each source category must operate. A finding under Section 111 requires that emissions from a specific stationary source category endanger public health and welfare, while the finding under Section 202 requires that emissions from all mobile sources combined endanger public health and welfare. It is illegitimate for EPA to substitute one standard for the other.

Importantly, the Section 111(b) language permits regulation of stationary sources only from "a *category of sources* . . . [which] *significantly* causes or contributes significantly to air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphasis added). In contrast, the Section 202(a) language broadly includes all mobile emission sources of any given pollutant, without any requirement of "significant" contribution to endangerment. 42 U.S.C. § 7521(a)(1). Thus, Section 111(b) is more demanding because it requires EPA to make an endangerment finding that is not only specific to each stationary source category that EPA seeks to regulate, but also contains a "significance" threshold for each source category. EPA therefore failed to make the endangerment finding required under Section 111 to support its promulgation of the Clean Power Plan, and any replacement rule seeking to regulate carbon dioxide emissions from electric generation units would have to be preceded by a proper significant contribution finding, as required by the Act.

Second, if EPA is to regulate carbon dioxide emissions from stationary sources, EPA must proceed under Section 108 of the Act and not under Section 111. Section 108 is the regulatory path Congress prescribed for air pollutants in the "ambient air" emitted from "numerous or diverse" sources, while Section 111 is the path for emissions from specific source categories that pose more localized air pollution concerns. Carbon dioxide is a ubiquitous substance that is emitted into the "ambient air" from "numerous or diverse" sources. 42 U.S.C. § 7408(a)(1). Consequently, any regulation of carbon dioxide emissions from stationary sources was required to proceed under Section 108 of the Act rather than Section 111. Accordingly, EPA failed to act in

the manner required by statute when it promulgated the Clean Power Plan, and it would have to follow the correct statutory path for any replacement.

Third, in its proposal to repeal the Clean Power Plan, EPA is also proposing to factor in the uncertainty between the health "co-benefits" of CO2 and fine particulate matter ("PM2.5"). 82 Fed. Reg. 48,035, 48,043-48,044 (Oct. 16, 2017). That uncertainty was effectively ignored by the prior Administration. Recent scientific studies cast doubt on the evidence of a causal link between PM2.5 and mortality, providing ample reason not only to reevaluate the necessity for any replacement to the Clean Power Plan but also to reconsider the necessity of the stringent current NAAQS PM2.5 standards. If EPA decides to proceed along the arduous path to lawfully regulating carbon dioxide emissions from electric generating units, it should address that issue when reevaluating the previously presumed health co-benefits, especially in the light of the fact that the Agency is currently undertaking a five-year review of the particulate matter NAAQS.

Finally, any replacement would face the same administrative law problem as the Clean Power Plan because of two important legal canons of construction applied to agency assertions of authority: (1) the canon against asserting agency authority over questions of vast economic and political significance without a clear authorizing statement from Congress, and (2) the canon against disrupting the established constitutional balance between the states and the federal government in an area traditionally regulated by states unless the statute under which the agency acts clearly authorizes the intrusion. Both of these canons of construction argue against issuing a replacement rule under Section 111(d).

The remainder of these comments provide detailed explanations of why the creation of a replacement for the Clean Power Plan under Section 111(d) faces serious legal obstacles.

EPA Faces a Daunting Framework for Promulgating a Lawful Replacement for the Clean Power Plan

I. Any replacement for the Clean Power Plan must not exceed the limits of Section 111 of the Clean Air Act by encouraging "generation shifting" from particular sources to others, going beyond the regulation of the performance of any specific sources.

The proposed repeal of the Clean Power Plan correctly sets forth one of the reasons why EPA exceeded its statutory authority. Section 111(d) of the Act authorizes EPA to regulate emissions through *performance standards*. EPA's Clean Power Plan establishes a carbon dioxide regulatory scheme for the states based upon three building blocks, only the first of which sets performance standards: (1) increasing efficiency at coal-fired power plants; (2) substituting natural gas for coal; and (3) substituting renewable resources, such as wind and solar, for fossil fuels. 80 Fed. Reg. at 64,662-01, 64,745. Building blocks 2 and 3 are not authorized by the Act because they do not set performance standards. Rather, they dictate the manner by which states determine the mix of resources that will be utilized by power plants to generate in-state power.

In promulgating the Clean Power Plan, EPA asserted authority to "shift generation from dirtier to cleaner sources." 80 Fed. Reg. at 64,726. But when it struck EPA's so-called Tailoring Rule regulating emissions of greenhouse gases from certain stationary sources, the Supreme Court observed that "when an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *UARG v. EPA, 134 S. Ct. 2427*, 2444 (2014) (citation and quotes omitted). EPA claims to have found in Section 111(d), a long-extant provision, the power to transform the nation's energy grid by dictating to the states how to allocate state resources. The text of Section 111(d) does not provide EPA with any such authority.

Section 111(d) authorizes EPA only to establish "standards of performance for any existing source" that reflect emission reductions through improvements to a source's performance. 42 U.S.C. § 7411(d)(1)(A). A "standard of performance" is "appl[icable] . . . to a particular source," *id.* § 7411(d)(1)(B), and sets forth "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction," *id.* § 7411(a)(1). Section 111(d) thus addresses the reduction of emissions by improving a source's "performance" through measures that can be applied to the source. The Clean Power Plan exceeds EPA's authority under Section 111(d) because building blocks 2 and 3 are not measures that can be applied to an individual source's "performance." Rather, the Clean Power Plan imposes measures that favor the use of renewable resources over fossil fuels. 80 Fed. Reg. at 64,745. That impermissibly strays beyond improving performance or efficiency at individual existing power plants because it seeks to dictate each state's use of specific types of fuels to generate electricity.

Congress did not intend for EPA to use Section 111(d) to transform the national energy grid, picking winners and losers among existing power generation stationary source categories in the process, nor did it intend for EPA to dictate to the states actions which the Agency is not authorized to take. EPA rightly seeks to repeal the Clean Power Plan on this basis; obviously, any replacement plan must accept these legal limitations.

II. Any replacement for the Clean Power Plan would be unlawful because EPA is precluded from regulating emissions from power plants under Section 111 of the Clean Air Act because such emissions are already regulated under Section 112 of the Act.

EPA first regulated coal- and oil-fired electric generating units under Section 112 on December 20, 2000, 65 Fed. Reg. 79,825, 79,830, and on February 16, 2012, issued additional regulations under Section 112, further subjecting such fossil fuel-fired power plants to stringent emissions limitations. 77 Fed. Reg. 9304 (Feb. 16, 2012). But "EPA may not employ [Section 111(d)] if existing . . . sources of the pollutant in question are regulated under the . . . 'hazardous air pollutants' program of [Section 112]." *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). Accordingly, the Clean Power Plan's purported font of authority to regulate carbon dioxide emissions from those same sources, Section 111(d), was foreclosed by the fact that those sources were already regulated under Section 112.

The plain meaning of the Act requires this conclusion. Section 111(d) provides that EPA may "establish[] standards of performance for any existing *source* for any air pollutant . . . which is *not* . . . emitted from a *source category* . . . regulated under [Section 112]." 42 U.S.C. § 7411(d)(1) (emphasis added). That language must be given effect as written. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (specific content and context of language used by Congress drives statutory construction).

In its promulgation of the Clean Power Plan, EPA asserted that the phrase "source category . . . regulated under section [1]12" was ambiguous, 80 Fed. Reg. at 64,713, and that it was justified in interpreting it "only [to] exclud[e] the regulation of HAP emissions under [S]ection 111(d) and only when th[e] source category [at issue] is regulated under [S]ection 112." *Id.* at 64,714. This was an unsupportable contention.

Prior to its proposal of the Clean Power Plan, EPA had never sought to regulate source emissions under Section 111(d) when emissions from such sources were already regulated under Section 112. The only two instances where EPA regulated source emissions under both sections occurred where the Section 111(d) regulation had *preceded* the Section 112 regulation. *See* 44 Fed. Reg. 29,828 (May 22, 1979) (Section 111(d) regulations for Kraft Paper Mills) *and* 63 Fed. Reg. 18,501, 18,501-03 (Apr. 15, 1998) (Section 112 regulations for Kraft Paper Mills); *compare* 64 Fed. Reg. 60,689 (Nov. 8, 1999) (Section 111(d) regulations for municipal solid waste landfills), *and* 68 Fed. Reg. 2227 (Jan. 16, 2003) (Section 112 regulations for municipal solid waste landfills).

The Act does not explicitly prohibit regulation of source categories under Section 112 where emissions from such sources are *already regulated* under Section 111(d). But the plain language of the Act does prohibit the converse—regulation of sources under Section 111(d) where such source categories are already regulated under Section 112. EPA had never before issued Section 111(d) regulations for a source category that was already subject to regulation under Section 112, and its attempt in the Clean Power Plan to torture the plain meaning of the Act should be reversed. *See UARG*, 134 S. Ct. at 2445 (EPA has no power to tailor the Clean Air Act to meet "bureaucratic policy goals.").

Contrary to the position taken by the prior Administration in the legal challenge to the Clean Power Plan filed in the United States Court of Appeals for the D.C. Circuit, the Legislative History of the Act reinforces the plain meaning of Section 111(d). Prior to 1990, Section 112 was intended to control specific hazardous air pollutants injurious to human health by authorizing EPA to set stringent national emissions standards for particularly dangerous air pollutants. The 1990 Amendments to the Act effectively changed the focus of Section 112 from direct regulation of hazardous air pollutants based on health effects to regulation of specific sources of pollutants based on application of technological emissions controls. *See* Daniel Brian, *Regulating Carbon Dioxide Under the Clean Air Act as a Hazardous Air Pollutant*, 33 Col. J. Envtl. L. 369 (2008).

During the amendment process, Congress enacted two versions of Section 111(d) in the Statutes at Large. The House version adjusted the corresponding provision of Section 111(d) to reflect the change in focus of Section 112 by prohibiting EPA from establishing Section 111(d) regulations "for any existing *source* for any air pollutant . . . emitted from a *source category* which is regulated under Section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. at 2399, 2467 (emphasis added). But the Senate version adjusted the cross reference by prohibiting EPA from establishing Section 111(d) regulations "for any existing source for any *air pollutant* . . . included on a list [under Section 112]." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2474 (emphasis added). Thus, while the House version properly reflected the change in Section 112 by prohibiting the dual regulation of a "source category," the Senate version did not reflect that change but prohibited dual regulation of "pollutants," reflecting the pre-1990 version of Section 112.

Only the House version of Section 111(d) was codified in the United States Code, because it was consistent with the source-specific changes made to Section 112, while the Senate version was not. 70 Fed. Reg. 15,994,16,030-31 (Mar. 29, 2005) ("The codifier's notes to this section of the Official Committee Print of the executed laws states that the Senate amendment 'could not be executed' because of the other amendment to section 111(d) contained in the same Act.").

Codification in the United States Code is prima facie evidence of the validity of the language as codified. *Stephan v. United States*, 319 U.S. 423, 426 (1943). EPA has previously acknowledged that "a literal reading of the House language would mean that EPA cannot regulate [air emissions under Section 111(d)] from a source category regulated under section 112." 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005). EPA has even acknowledged that the Senate amendment is a "drafting error" and should not be considered as either binding or effective. *Id.* at 16,031-32. The type of scrivener's error that appears in the Senate version is not uncommon in "enormous and complex statutes" and "cannot create an ambiguity" of itself to authorize EPA's action in the Clean Power Plan. *American Petroleum Institute v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

At most, if any effect should be given to the Senate version, it must be in a way that is consistent with the House version. Because the House version prohibits dual regulation of "sources," while the Senate version prohibits dual regulation of "pollutants," the way to reconcile the two is to give effect to both. Accordingly, regulation under Section 111(d) would be prohibited if either the same pollutant or the same source is regulated under Section 112. *See Morton v. Mancari*, 417 U.S. 353, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Because EPA lacked authority to regulate under Section 111 due to the fact that electric generating units were already regulated under Section 112, it would seem problematic at best for EPA to justify a replacement for the Clean Power Plan that relied on such non-existing authority.

III. In promulgating a replacement for the Clean Power Plan, EPA would be required to make a carbon dioxide endangerment finding under Section 111 of the Clean Air Act.

Even if EPA had authority for the Clean Power Plan by way of Section 111(d), it failed to follow all the requirements to do so; in fashioning any replacement, the Agency would need to go back and lay the groundwork necessary to follow them. As a prerequisite to regulating emissions under Section 111, the Act requires EPA to make a determination that pollutants from the source category it seeks to regulate "cause[s] or contribute[s] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

While this endangerment finding provision is set forth in Section 111(b), which governs emissions from new sources, it is also the *regulatory prerequisite* for governing existing sources, such as the electric generating units affected by the Clean Power Plan, under Section 111(d); the Act requires that EPA must establish valid standards of performance for new sources under Section 111(b) before it can regulate existing sources from the same source category under Section 111(d).

EPA's proposed Section 111(b) rule for new sources contended that it did not make an endangerment finding in connection with carbon dioxide emissions from fossil fuel-fired power plants because it had already made an endangerment finding for a *different* pollutant emitted by such sources and therefore only needed a "rational basis" for expanding the new source performance standards for carbon dioxide. 79 Fed. Reg. 1430, 1454 (Jan. 8, 2014). In response to comments filed by the public, EPA elaborated on the "rational basis" argument by declaring that its endangerment finding in connection with greenhouse gas emissions from mobile sources under Section 202 of the Act was sufficient to comply with the endangerment finding requirement of Section 111(b). 80 Fed. Reg. 64,510, 64,531-38 (Oct. 23, 2015). Both arguments were belied by the text and structure of the Clean Air Act.

Under the Act, EPA must make both a source-specific and a pollutant-specific endangerment finding before issuing standards of performance under Section 111(b). To satisfy the endangerment finding requirement, EPA must find that a "category of *sources* . . . causes, or contributes *significantly* to, *air pollution* which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(emphasis added). The plain language requires EPA to make an endangerment determination that is (1) pollutant-specific, (2) source-specific, and (3) includes a significance finding with regard to the "air pollution" at issue.

EPA was required to make an endangerment finding that carbon dioxide emissions from fossil fuel-fired power plants cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. EPA did not make that finding in its promulgation of the Clean Power Plan. 80 Fed. Reg. at 64,530-31. Instead, it took the position that a "rational basis" for regulating carbon dioxide emissions from fossil fuel-fired power plants is sufficient, impermissibly rewriting the Clean Air Act. *See UARG*, 134 S. Ct at 2444.

Moreover, the "rational basis" proffered by EPA was anything but. EPA took the position that it could use the endangerment finding it made for new mobile sources under Section 202(a) to support its regulation of new stationary sources under Section 111(b). 80 Fed. Reg. at 64,530-38. This was wrong for four reasons.

First, the statutory language authorizing the two findings are not identical. The Section 111(b) language permits regulation of stationary sources only from "a *category of sources* . . . [which] *significantly* causes or contributes significantly to air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphasis added). In contrast, the Section 202(a) language broadly includes all mobile emission sources of any given pollutant without any requirement that mobile sources contribute "significantly" to endangerment. 42 U.S.C. § 7521(a)(1). Thus, Section 111(b) is more demanding because it requires EPA to make an endangerment finding that is not only specific to each stationary source category that EPA seeks to regulate, but also has a "significance" threshold for each source category that EPA seeks to regulate under Section 111. No such threshold is found in Section 202(a).

Second, the structure of the Act requires that a mobile-source-specific endangerment finding be made before new mobile sources can be regulated under Section 202(a) of Title II, and that a separate stationary-source-specific finding be made before new stationary sources may be regulated under Section 111(b). If Congress had intended to collapse the two findings into a single, comprehensive endangerment finding for mobile and stationary sources of any particular pollutant, it could have easily done so, but it did not. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (where language is included in one sentence of a statute but excluded in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Third, as explained above, the plain meaning of the Act requires a stationary source-and-pollutant-specific endangerment finding before any stationary source can be regulated under Section 111(b).

Fourth, EPA's endangerment finding made in 2009 under Section 202(a) covered "six greenhouse gases taken *in combination*." 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (emphasis added). By contrast, EPA's endangerment finding under Section 111(b) applies only to carbon dioxide, 79 Fed. Reg. 1430, 1455 (Jan. 8, 2014), a single component of the aggregate greenhouse gases for which the endangerment finding was made under Section 202(a). Accordingly, EPA's efforts to bootstrap the stationary source finding onto the mobile source finding by inventing a "rational basis" test found nowhere in the Clean Air Act are ineffective. It is a "rudimentary principle" of administrative law that regulatory action must comply with statutory requirements. *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

EPA was not permitted to selectively weave separate provisions of the Act governing entirely different types of sources, or entirely different types of pollutants, into a fabric that is foreign to the text and structure of the Act. "[S]tatutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"

UARG, 134 S. Ct. at 2442 (quoting *Robinson*, 519 U.S. at 341). Were it determined to implement a replacement for the Clean Power Plan that avoided its legal defects, EPA would be required to undertake the process of making a new endangerment finding under Section 111.

IV. Any replacement for the Clean Power Plan must be promulgated under Sections 108-110 of the Clean Air Act, rather than under Section 111 of the Act.

But even following the endangerment finding provisions under Section 111 would not save the fate of any replacement plan, because the structure of the Clean Air Act requires EPA to regulate carbon dioxide emissions from stationary sources under Sections 108-110 of the Act. The Clean Air Act establishes a complex regulatory scheme through distinct administrative programs targeted at different types and sources of air pollutants. Stationary sources of air pollution are regulated under Title I of the Act, while mobile sources are regulated under Title II.

EPA promulgated the Clean Power Plan under Title I, which contains three regulatory programs, each with its own unique purposes, triggers, and substantive provisions. By regulating carbon dioxide emissions from electric generating units under Section 111 of the Act, which embodies Title I's source-performance program, rather than under Sections 108-110 of the Act, which embody Title I's ambient air quality program, EPA failed to act according to distinct statutory requirements.

Title I authorizes EPA to establish National Ambient Air Quality Standards ("NAAQS") under Sections 108 through 110 of the Act. 42 U.S.C. §§ 7408-7410. NAAQS prescribes maximum, uniform ambient air concentrations of particular air pollutants, and no area of the Nation may exceed these prescribed concentrations. *See generally* George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA*, 44 U. Rich. L. Rev. 919 (2010). In turn, states are responsible for attaining and maintaining NAAQS within their jurisdictions. EPA has set NAAQS for six air pollutants, known as "criteria pollutants": lead, nitrogen dioxide, particulate matter PM10, particulate matter PM2.5, carbon monoxide, ozone, and sulfur dioxide. 40 C.F.R. §§ 50.2-50.16. To designate a particular air pollutant as a criteria pollutant, EPA must first make a finding under Section 108 that the pollutant is emitted from "numerous and diverse" sources and "endangers" public health or welfare. 42 U.S.C. § 7408(a)(4).

The NAAQS regulatory regime is "the engine that drives nearly all of Title I." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). Title I also contains the source-performance program of Section 111, under which EPA regulates air emissions from specific categories of sources for which a unique, source-category endangerment finding is made. 42 U.S.C. § 7411(b)(1)(A).

Generally, Section 111(d) regulates existing sources, while section 111(b) regulates new and modified sources. Pollutants regulated under Section 111 are referred to as "designated pollutants" and are regulated under guidelines "developed for specialized types of emission

sources that emit discreet types of pollutants." *See generally* 40 C.F.R. § 62. EPA justified its promulgation of the Clean Power Plan under Section 111(d).

The third regulatory program under Title I, set forth in Section 112, authorizes EPA to regulate hazardous air pollutants deemed particularly dangerous to human health by imposing strict national emissions standards for specific source categories of such pollutants. 42 U.S.C. § 7412. The interaction of this provision with Section 111 was discussed earlier, as an additional ground for repealing the Clean Power Plan. *See* Section II.

Sections 108-110, as well as the structure of Title I of the Clean Air Act, make clear that air pollutants emitted from "numerous or diverse" sources into the "ambient air" that endanger public health or welfare must be regulated, if at all, as criteria pollutants under the NAAQS program and not under the source-performance program of Section 111. The Act explicitly provides that EPA "shall" regulate under the NAAQS program air pollutants "the presence of which in the ambient air results from numerous or diverse" sources where such pollutants "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1).

After EPA makes an endangerment finding under Section 108 and issues air quality criteria for pollutants subject to that finding, Section 109 requires EPA to "publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date." 42 U.S.C. § 7409(a)(1). Thus, promulgation of ambient air quality standards under the NAAQS program is the specific regulatory mechanism that EPA is required to use when regulating air pollutants emitted from "numerous or diverse" sources that "endanger public health or welfare."

Importantly, under Section 111 "emission source control is a supplement to air quality standards, not an alternative to them." *Natural Resources Defense Council v. Train*, 545 F.2d 320, 327 (2d Cir. 1976). Because carbon dioxide is a ubiquitous substance in the "ambient air" emitted from "numerous or diverse" sources, if it is to be regulated under Title I of the Act, the mechanism by which EPA may do so is limited to the NAAQS program under Sections 108-110. EPA failed to act under the required statutory mechanism when it promulgated the Clean Power Plan.

Relatedly, the Clean Power Plan was unlawful because EPA failed to make the requisite endangerment finding under Section 108 of the Clean Air Act. Although there are provisions for making endangerment findings in both Title I and Title II of the Act, only the provision in Section 108 authorizes EPA to regulate pollutants in the "ambient air" emitted by "numerous or diverse" sources. 42 U.S.C. § 7408(b). On the other hand, the Section 111(b) endangerment language, which was not created for ubiquitous substances like carbon dioxide, permits regulation of stationary sources only from a specific "*category* of sources . . . [which] causes, or *contributes significantly* to, air pollution [that endangers health or welfare]." 42 U.S.C. § 7411(b)(1)(A) (emphasis added). The endangerment finding provision of Section 111(b) differs from that set forth in Section 108 because the former requires EPA to make an endangerment finding that is not

only specific to *each stationary source category* that EPA seeks to regulate but also requires a higher "significance" threshold for each source category.

In addition to these two distinct endangerment finding provisions in Title I applicable to stationary sources, such as electric generation units, there are two other endangerment finding provisions in Title II. The first, set forth in Section 202, 42 U.S.C. § 7521(a)(1), is applicable to mobile sources such as cars and trucks. Section 202(a)(1) of the CAA states that "The Administrator shall by regulation prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." The second, set forth in Section 211, 42 U.S.C. § 7545(c)(1), is applicable to fuel additives.

Each of these Title II endangerment provisions require a unique "significance" regulatory threshold determination that differs from the endangerment finding of Section 108. Indeed, none of the endangerment provisions spread across Titles I and II of the Act is identical with any other, and the differences between them show that Congress intended each to apply to the specific circumstances addressed in each distinct regulatory program established by the Act. *See Rodriguez*, 480 U.S. at 525 (where language is included in one sentence of a statute but excluded in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). An endangerment finding made under one section, for a particular purpose, cannot substitute for an endangerment finding made under another section for a different purpose.

Any replacement for the Clean Power Plan that relied on the endangerment finding provisions of Section 111(b) as authorization for the regulation of carbon dioxide emissions from power plants would be contrary to the structure of the Act, because Section 111 was meant to function as a supplement to the NAAQS program under Sections 108-110 and not as a substitute for it. *See generally* Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 Stan. Envtl. L.J. 283 (2010) (the structure of the Act makes EPA's effort to regulate carbon dioxide emissions outside of the NAAQS program impermissible); *see also FDA v. Brown & Williamson*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (internal citations and quotation marks omitted).

Accordingly, when EPA seeks to regulate an omnipresent air pollutant such as carbon dioxide, emitted from "numerous or diverse" sources, it must make any endangerment finding under the NAAQS program for criteria pollutants rather than under the Section 111 program governing emissions from specific categories of stationary sources. To hold otherwise would permit EPA to cherry-pick particular terms out of the Act to support actions inconsistent with the Act's structure. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) ("In expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole

law, and its object and policy") (quoting *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)).

The specific language of Section 108 is clear. Emissions from "numerous or diverse" sources that endanger human health or welfare must be regulated as NAAQS criteria pollutants under Sections 108-110, and there is no ambiguity in the language. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

An agency interpretation that is inconsistent "with the design and structure of the statute as a whole" is illegitimate. *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Title I authorizes EPA to institute controls over pollutants in the "ambient air" emitted by "numerous or diverse" sources under the NAAQS program *only* when it follows the regulatory steps set forth in Sections 108-110. As a supplement to the NAAQS program, and not as a replacement for it, Congress authorized EPA to regulate air pollutants for specific categories of sources under the source performance standards of Section 111. *Train*, 545 F.2d at 327.

Accordingly, carbon dioxide emissions, which are emitted into the ambient air from numerous and diverse sources, were illegitimately regulated by the Clean Power Plan under the source-specific performance standards of Section 111, rather than under the means Congress mandated under Sections 108-110. *See MCI Telecommunications Corp. v. FCC*, 512 US 218, 231 (1994) (statutory meaning is based "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes"); *Corely v. United States*, 129 S. Ct. 1558, 1566 (2009) (no statute should be read to render any part "inoperative or superfluous, void or insignificant") (citation omitted).

The Act's legislative history only reinforces this analysis. For any replacement for the Clean Power Plan, EPA must proceed under the NAAQS program with regard to "all those pollutant agents or combinations of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile or stationary sources." Legislative History, Clean Air Act Amendments, Vol. 1 at 454.

Significantly, EPA has never before used Section 111(d) to regulate these types of emissions. This is the kind of "unheralded power" hitherto undiscovered in a "long-extant statute" that the Supreme Court instructs should be greeted with "skepticism," especially where, as in any regulation of the omnipresent substance carbon dioxide, a use of such power has "vast economic and political significance," as described below in Section VI. *UARG*, 124 S. Ct. at 2444.

V. Any replacement for the Clean Power Plan must take into account the uncertain relationship between regulation of greenhouse gas emissions and fine particulate matter.

In November of 2017, the Texas Public Policy Foundation filed an administrative petition with EPA, on behalf of Delta Construction Company, Inc., Dalton Trucking, Inc., Loggers Association of Northern California, Inc., Robinson Enterprises, Inc., Nuckles Oil Co., Inc. dba Merit Oil Company, and Western States Trucking Association, Inc. The petition requested that EPA "reconsider and make less stringent its current national ambient air quality standards ('NAAQS' or 'standards') for fine particulate matter ('PM2.5'), 78 Fed. reg. 3086 (Jan. 15, 2013), because those standards are based upon faulty assumptions." NAAQS Petition at 2. Specifically, "[r]ecent scientific analyses that cast doubt on the evidence of a causal link between PM2.5 and mortality provide ample reason to reconsider the necessity of the current PM2.5 standards." *Id.* at 4.

In its proposal to repeal the Clean Power Plan, EPA is also proposing to factor in the uncertainty between the health co-benefits of CO2 and fine particulate matter, PM2.5. 82 Fed. Reg. 48,035, 48,043-48,044 (Oct. 16, 2017), an uncertainty that was ignored by the prior Administration. The California Commenters advise EPA to examine and review the most recent scientific analysis of the health effects of PM2.5 in the referenced administrative petition before drafting any replacement for the Clean Power Plan.

VI. Any potential replacement for the Clean Power Plan must take into account the "major questions" canon of construction requiring a clear statement from Congress where an agency seeks to make a decision of vast economic and political significance.

In promulgating the Clean Power Plan, EPA's interpretation of its own authority under the Clean Air Act exceeded the limits of its interpretive power acknowledged in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). The first tenet of administrative law is that an agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). That maxim places the burden on EPA of demonstrating that Congress has in fact delegated to it authority over the precise question here. As the proposed repeal acknowledged, Congress has not delegated any such authority to EPA; any replacement plan would have to show that it was delegated.

Courts have refused to find implied delegations where the discretionary authority would have profound economic or political consequences. This has its roots in the nondelegation doctrine, which stands for the proposition that "the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v United States*, 488 US 361, 371-72 (1989) (citation omitted). However, "[i]n recent years, [judicial] application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise might be thought to be unconstitutional." *Id.* at 374 n. 7; *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.* (the "Benzene Case"), 448 U.S. 607, 642-46 (1980) (plurality opinion) (after finding serious

constitutional concerns relating to the nondelegation doctrine, invoking avoidance canon to narrow agency construction of provisions of the Occupational Safety and Health Act).

By forcing Congress to take explicit statutory responsibility for making the major decisions surrounding a statutory scheme, especially those of major economic or political significance, the courts have policed the regulatory boundaries of agencies to limit their assumption of Congress's role in making major policy decisions. *UARG*, 134 S. Ct. at 2444 (describing the EPA's interpretation of the statute, in part, as "laying claim to extravagant statutory power over the national economy"); *Bureau of Alcohol, Tobacco and Firearms v. FLRA,* 464 U.S. 89, 97, 104 (1983) (refusing to sanction "unauthorized assumption by an agency of major policy decisions") (citation omitted).

The Clean Power Plan's concept of "generation shifting," 80 Fed. Reg. at 64,677, 64,709, more fully described above, was just such an aggressive assertion of transformative power lacking a clear statement by Congress. Because that interpretation exceeded the bounds of legality, EPA is justified in repealing the Clean Power Plan; however, this also requires that EPA be mindful of these limits when deciding whether to fashion a replacement plan, and, if so, what the contours of such a replacement will look like.

VII. Any potential replacement for the Clean Power Plan must take into account the federalism canon requiring a clear statement from Congress where an agency seeks to override the usual balance between federal and state authority.

"Air quality regulation under the [Clean Air Act] is an exercise in cooperative federalism." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). Any replacement for the Clean Power Plan must be consistent with that foundation.

The Clean Air Act does not authorize EPA to intrude upon the traditional authority of states over in-state power resources. *See FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) (national electric power system is characterized by a "bright line" divide between federal authority over wholesale sales in interstate commerce regulated by FERC and state authority over planning, siting, and providing generation resources to local customers). No federal agency may disrupt "the usual constitutional balance between the states and the Federal Government" in an area traditionally regulated by states unless the statute under which the federal agency acts is "abundantly clear" and "compel[s] the intrusion." *United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424, 428 (D.C. Cir. 2013). .

The Clean Power Plan ran roughshod over intrastate generation and consumption of energy, which is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress did make a clear statement on this issue, but it is the mirror image of what the Clean Power Plan purports to do. The Federal Power Act recognizes the states' "traditional responsibility in the field of regulating electrical utilities for determining questions of need,

reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 205 (1983).

EPA's interpretation of Section 111 advanced in the Clean Power Plan usurped what has been the states' traditionally recognized authority over the energy mix. Not only is this absent an explicit clear statement from Congress authorizing such innovation, it is contrary to the explicit policy articulated by Congress in the Federal Power Act. EPA should be mindful of these limits on its authority when deciding whether to create a replacement for the Clean Power Plan.

Conclusion

EPA has identified the major flaws in the Agency's legal justifications for the Clean Power Plan, and rightly seeks to repeal it. Because EPA's ANPR has queried whether EPA should develop a more limited replacement rule for the Clean Power Plan, these comments explain why the mere replacement of the Plan under Section 111(d) would be legally indefensible. If EPA wishes to regulate carbon dioxide emissions beyond those already covered by the mobile source standards, these comments set forth the extensive processes under the Clean Air Act that EPA would be required to navigate to lawfully regulate such emissions.

Respectfully submitted,

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